(2) Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF SOUTH CAROLINA,

Petitioner,

vs

JAMES DONALD FOSSICK,

Respondent.

A P P E N D I X

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51 pp

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
James Donald Fossick, 132291, Applicant, vs. State of South Carolina, Respondent.	92-CP-40-1193 ORDER OF DISMISSAL

This matter arises pursuant to a Post-Conviction Relief Application dated March 5, 1992. Respondent made its Return on June 16, 1992 and Supplemental Return and February 5, 1993. An evidentiary hearing was held on February 12, 1993, at which time Applicant was present and was represented by Ben N. Miller, Esquire, of the Richland County Bar. Respondent was represented by Salley W. Elliott, Deputy Attorney General.

At the hearing, the parties made stipulations as to matters of fact and requested permission to submit trial briefs as to the

legal issues involved. The court also had before it a copy of the transcript of the proceedings had against Applicant; the records of the Richland County Clerk of Court in the case, the records of the South Carolina Department of Corrections in the case; Applicant's Proposed Case and Exceptions on direct appeal; the South Carolina Supreme court Memorandum Opinion in the direct appeal; Respondents exhibits; and the stipulations of fact.

Statement of Proceedings

The records before this Court indicate that Applicant, James Donald Fossick, is presently confined in the Broad River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the October 1985 term of the Court of General Sessions for Richland County for murder. Applicant was represented by L. Lester

Bates, III, Esquire, as primary trial counsel. Also present during the trial were William R. Bauer, Esquire, and James N. Parr, Jr., Esquire. A jury trial was held on January 27-29, 1986, at the conclusion of which the Applicant was found guilty of murder. Applicant was sentenced by the Honorable C. Anthony Harris to confinement for life.

The Applicant filed a timely Notice of Intent to Appeal and, an appeal was perfected by Lester L. Bates, III, Esquire. The Applicant briefed the following questions on direct appeal:

> (1) whether the trial court erred in admitting into evidence Applicant's confession;
>
> (2) whether the trial court erred in failing to properly charge the jury regarding the voluntariness of the confessions;
>
> (3) whether the trial court erred in failing to properly charge the jury regarding the law of malice;
>
> (4) whether the trial court erred in allowing the State to refer to the Defendant's religious beliefs;

(5) whether the trial court erred in failing to charge the jury that the State must prove the Defendant murdered the deceased.

In exceptions raised but not briefed to the Supreme

Court, Applicant raised the following:

(1) whether the lower court erred in not granting a mistrial after motion by Applicant's attorney concerning Applicant's regard for the Bible because it was unduly prejudicial;

(2) whether the lower court erred in not allowing Applicant's jury charge number five which requested an instruction that the State prove the Defendant committed the murder because without the instruction the legal standard of proof for a murder conviction was lessened;

(3) whether the lower court erred in not charging the jury that malice cannot be presumed solely from the use of a deadly weapon, the error being the charge requested was applicable to the facts of the case and was a correct statement of law not otherwise included.

After filing briefs in this case, oral argument was heard by the Supreme Court of South Carolina on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court

affirmed Applicant's conviction and sentence in Memorandum Opinion No. 87-MO-300 filed June 22, 1987.

Issues Raised by Way of Application For Post-Conviction Relief

In the Application for Post-Conviction Relief, Applicant alleges as grounds for relief that he received ineffective assistance of counsel because:

> (1) trial counsel provided ineffective assistance when he failed "to accept the trial court's instruction to the jury regarding Applicant's statement of nonreligious beliefs;"
>
> (2) trial counsel provided ineffective assistance of counsel when he failed "to object to the Solicitor's improper reference to Applicant's lack of remorse in the Solicitor's "closing arguments;"
>
> (3) trial counsel provided ineffective assistance when counsel failed "to object to the reasonable doubt charge by the court;"
>
> (4) trial counsel provided ineffective assistance when counsel failed "to object to the jury instruction shifting the burden of proof to the Applicant;"
>
> (5) trial counsel provided ineffective assistance when counsel

failed "to object to the trial court's erroneous malice instruction;"

(6) trial counsel provided ineffective assistance when counsel failed "to challenge for cause the seating of Assistant United States Attorney, Mr. Emory Clark, as a prospective juror."

Applicant made no amendments to the Application during the evidentiary hearing. Without objection, Respondent amended its Return by adding the January 31, 1986 transcript; Appellant's and Respondent's briefs on direct appeal; Appellant's proposed case and Exceptions on direct appeal; and Supreme Court Memorandum Opinion No. 87-MO-300 in Applicant's direct appeal.

Stipulations

The parties made the following stipulations of fact:

(1) Lester Bates, III acted as Applicant's primary counsel, and Mr. Bates died Thanksgiving Day, 1991. Respondent is unable to elicit from Mr. Bates specific testimony as to the issues Applicant raises in his Post-Conviction Relief Application;

(2) The role of William R. Bauer, Esquire, was to sit at counsel table during Applicant's trial and assist Lester Bates, III during trial, and due to the passage of time since the trial, Mr. Bauer has little specific recollection of discussions as to trial strategy on the issues Applicant now raises;

(3) James N. Parr, Jr., Esquire, was in the same law firm as Lester Bates, III, and assisted in research and brief writing during the initial stages of Mr. Bates' representation of Applicant and interviewed Applicant a few times. However, during the later stages of representation, Mr. Parr's role was merely to sit at counsel table during trial;

(4) Counsel thoroughly, diligently, and extensively investigated and prepared this case for trial, including investigation and research into the jury and the law on reasonable doubt and malice;

(5) Counsel for Applicant researched the potential jurors, reviewed the jury list, and made a decision to include juror Emory Clark because counsel thought a lawyer would better understand Applicant's confession defense, as well as the timing involved in Applicant's defense of alibi. Counsel specifically, counsel wished to have the juror about which Applicant now complains sit on Applicant's jury;

(6) In 1986, the United States Attorney's office was located in

the Federal Building at the corner of Laurel and Assembly Streets in Columbia, South Carolina;

(7) In 1986, the Federal Building was a federally owned building in which the federal government leased office space to federal agencies, including the Bankruptcy Court on two floors and the United States Attorney's office on the first and separate floor from the Bankruptcy Court;

(8) In 1986, the United States District Court Courthouse was across the street from the Federal Building;

(9) Subsequent to 1986, the United States Attorney's Office was relocated to the IBM Building on Main Street in Columbia, South Carolina.

The parties also consented to the introduction into evidence of the following Respondent's exhibits:

(1) Trial counsel's juror strike sheet;

(2) Request for jury charge numbers one and two as submitted by trial counsel;

(3) Trial counsel's notes for oral argument to the Supreme Court;

(4) Voir dire questions submitted by trial counsel;

(5) Trial counsel's billing statements;

(6) Trial counsel's jury list;

Applicant made no amendments to the application during the evidentiary hearing.

Ineffective Assistance of Counsel

Applicant contends that he received ineffective assistance of trial counsel and raises numerous allegations in support of his claim. It is clear that a criminal defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). This Court finds that Applicant's attorneys were diligent in their representation of the Applicant and that the attorneys' performance was well within the range of competence demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). The United States Supreme Court has set forth a two-prong test to determine whether a conviction should be reversed based upon inef-

fective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). A defendant must first show a deficiency in counsel's performance. In making this determination:

> ...(A) court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound strategy.'

Strickland v. Washington, supra, at 80 L.Ed. 694, 695.

To reconstruct the circumstances of the challenged conduct, the court must also eliminate the effects of hindsight and evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, supra, at 694.

Applicant must also satisfy the second prong of the Supreme Court's test which requires a showing by Applicant that he was prejudiced by counsel's performance. Stri-

ckland v. Washington, supra. In Strickland, the Supreme Court determined that:

> The Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

It must be determined whether there is "a reasonable probability that absent the errors, the fact/finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, supra, at 80 L.Ed 698. In reviewing an ineffective assistance claim, this court must also review counsel's performance based upon the totality of the circumstances and be mindful that "even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, supra. The Court must also keep in mind that "even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, supra, at 80 L.Ed 2d 695. Also, matters of trial strategy do

not constitute ineffective assistance. Strickland v. Washington, supra. For the reasons set forth below, this Court finds that Applicant has failed to meet his burden of proof with regard to ineffective assistance of trial counsel.

A. Counsel declines curative instruction.

At Applicant's trial and during the direct examination of Investigator Fuller concerning Applicant's confession, the prosecution asked Investigator Fuller whether Applicant made any reference to the Bible during Fuller's interview of Applicant. Fuller replied that, upon showing Applicant the Bible and asking Applicant what it was, Applicant responded that it looked like the Bible but the Bible was just another book to him. (Tr. p. 246, line 19 - p. 247 line 3). Trial counsel immediately objected to the testimony and requested that it be stricken from the record. (Tr. p. 247 lines 4-5). The prosecutor responded that he would not

question further on that point. (Tr. p. 247 lines 6-8). At the conclusion of the witness' testimony and in the jury's absence, trial counsel moved for a mistrial based upon the testimony of the investigator and his reference to Applicant's characterization of the Bible. Trial counsel argued to the trial court that the colloquy was an improper reference to Applicant's beliefs. (Tr. p. 268 lines 12-19; p. 269, lines 7-18). Counsel argued that his research as to the jury members would indicate that they are deeply religious and would be offended by the remark. (Tr. p. 269 lines 15-18). The trial court denied the motion for mistrial but indicated it would give a curative instruction regarding the reference to the Bible. (Tr. p. 268 line 24; p. 269 lines 19 - p. 270 line 1). Trial counsel declined the trial court's offer to give a curative instruction stating that such an instruction "would merely call the jury's attention to

it..." (Tr. p. 2-5). At the conclusion of the case for the State and again when the defense rested, trial counsel moved for a mistrial upon this ground, but both motions were denied by the trial court. (Tr. p. 295, lines 16-20; p. 44, lines 9-12). Counsel also included this as grounds for motions after the guilty verdict. (Tr. p. 561 lines 1-14). Applicant's counsel also raised this issue to the South Carolina Supreme Court on appeal, arguing that it was irrelevant and impermissibly put Applicant's character in issue. The Supreme Court affirmed the conviction.

Applicant complains in his Post-Conviction Relief Application that trial counsel provided ineffective assistance when he declined the trial court's offer of a curative instruction. This Court finds that trial counsel declined the trial court's curative instruction concerning reference to the Bible based upon trial strategy. It was

obviously trial counsel's opinion that the curative instruction would only highlight for the jury the testimony which he felt prejudicial, further compounding the reference, particularly where the testimony was properly elicited by the State in response to Applicant's defense that Bible verses read to Applicant were used to attempt to coerce the confession from him. (Tr. p. 270 lines 2-5). (See Respondent's Brief on appeal pp. 20-25). Trial counsel's strategy was reasonable and did not constitute ineffective assistance.

B. Reference to remorse.

During summation to the jury, Solicitor Anders argued:

> It took him 28 minutes and 37 seconds. That's all it took him, 28 minutes and 37 seconds. He's got no remorse, no tears... Go back and vote guilty and come back in here and tell people like this, without remorse, without feeling, without anything, that 'we aren't going to tolerate it here in our county.'

(Tr. p. 35 lines 19-21; p. 536 lines 21-24). Trial counsel did not object during the argument and the issue was not raised on direct appeal.

In his Post-Conviction Relief Application, Applicant complains that the solicitor's reference to Applicant's lack of remorse was improper in that it constituted a comment upon Applicant's right to plead not guilty and put the State to its burden of proof. He asserts that it would be inconsistent for him to plead not guilty, present the defense of alibi, and then simultaneously express remorse for the act which he has denied committing.

The South Carolina Supreme Court has ruled that an accused has a constitutional right to plead not guilty and put the State to its burden of proof, to act as his own attorney, to confront witnesses, and that when an accused asserts one of these constitutional rights, it is impermissible for the

State to comment or argue in favor of guilt based upon that assertion. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Specifically, the Court has held that an accused has the right to put the State to its burden of proof, and it is improper for the State to argue in favor of guilt based upon that action. State v. Johnson, supra; State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). See also Griffin v. California, 380 U.S. 609 (1965); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). A solicitor must confine his argument to the record and its reasonable inferences. State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988).

This Court funds the references during the solicitor's argument to Applicant's lack of remorse were inappropriate and improper. However, Applicant has the burden of demonstrating that the solicitor's argument had the effect of denying him a fair determination of the issues involved.

State v. Coleman, 301 S.C. 57, 389 S.E. 2d 659 (1990). In viewing the portion of the argument about which Applicant complains in the context of the entire record, State v. Copeland, 278 S.C. 572, 300 S.E. 2d 63 (1982), Applicant cannot show that the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 388 S.E. 2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E. 2d 132 (1985); State v. Hawkins, 357 S.E. 2d 10 (1987); Donnelly v. DeCristoforo, 416 U.S. 637 (1974); Darden v. Wainwright, 477 U.S. 187 (1986). In this case there is strong evidence of Applicant's guilt. The record reflects the trial court charged that jury members were the sole judges of the facts which must be decided upon the evidence consisting of testimony and exhibits (and inferentially not arguments of trial counsel and the prosecution). The solicitor's use

of the word "remorse" twice during his closing argument is a minuscule part of the record in comparison to the record as a whole. Error, if any, was harmless. Applicant has not shown counsel's failure to object constituted deficient performance or was prejudicial, and indeed it may have been trial strategy.

C. Reasonable doubt.

At the close of the evidence, the trial court presented its charge to the jury. With regard to reasonable doubt, the trial court charged as follows:

> That phrase has no magical qualities. Beyond a reasonable doubt means the same thing when used in a legal sense as it does in ordinary everyday English language; and that is a doubt for which you have a real reason. It excludes the whimsical or fanciful doubt because you could doubt any proposition if you wanted to. A reasonable doubt means a substantial doubt for which honest people seeking the truth can give a real reason.

(Tr. p. 543 line 22 - p. 544 line 5).

After the trial court's charge to the jury, trial counsel objected to the trial court's reasonable doubt charge because the trial court failed to give counsel's requested charge. (Tr. p. 553 lines 13-14). (See Respondent's Exhibit #2 - Jury Charge Requests 1 and 2). Counsel requested in charge 2 that the jury be instructed that "a reasonable doubt may arise solely from a lack of evidence produced by the State as to any of the elements of murder." (Tr. p. 553 lines 13-17; Exhibit #2). In charge 1, he requested with regard to alibi that the burden was upon the State and where there was reasonable doubt regarding the evidence, the Applicant must be acquitted. The trial court denied the trial counsel's request stating that the jury was fully charged on reasonable doubt and needed no further charge. (Tr. p. 553 lines 18-20). The issue was not raised on appeal to the South Carolina Supreme Court.

In his Application for Post-Conviction Relief, Applicant complains that the trial court erred when it equated reasonable doubt with substantial doubt. He asserts that as substantial doubt requires a higher degree of doubt than reasonable doubt, the jury could have interpreted the instructions to allow a finding of guilty based on a degree of proof below that required by the Due Process Clause. This Court notes that trial counsel initially made a specific request for a reasonable doubt instruction which provided no definition of reasonable doubt and which was denied by the trial court.

Secondly, this Court finds that counsel's failure to object to the reasonable doubt charge did not constitute ineffective assistance because the charge correctly reflected the law at the time it was given. At the time of Applicant's trial, the United States Supreme Court and the Fourth Circuit Court of Appeals, while criticizing attempts

to define reasonable doubt as "substantial," "real," or "actual" doubt or "reasonable moral certainty," determined that it was not a per se constitutional violation. Taylor v. Kentucky, 436 U.S. 475 (1978); See Murphy v. Holland, 776 F.Ed.2d 470 (4th Cir. 1985); U.S. v. Love, 767 F.2d 1052 (4th Cir. 1985). The South Carolina Supreme Court has consistently ruled it was not erroneous to define reasonable doubt as substantial doubt and doubt for which you can give reason. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). The Court of Appeals has specifically upheld the convictions when similar instructions were used in Gaskins v. McKellar, 916 F.Ed.2d. 941 (4th Cir. 1991). Trial counsel's conduct must be assessed under the prevailing professional norms at the time of trial. Strickland v. Washington, supra. Even if he had not requested other reasonable doubt charges, trial counsel's reliance upon the State Supreme

Court's ruling on this issue was reasonable. Trial counsel's conduct was, therefore, not deficient.

While review of counsel's conduct normally ends when Applicant fails to present proof of the deficiency, this Court additionally and alternatively finds that Applicant has failed also to show prejudice in trial counsel's failure to object to the reasonable doubt charge. Had counsel objected to the reasonable doubt charge, the objection would have been overruled based upon the prevailing law in the state at the time. Applicant also fails to show prejudice because the jury instruction given on reasonable doubt, even if given today, would not violate Applicant's rights to due process under the 1990 United States Supreme Court decision of Cage v. Louisiana, ____ U.S. ____, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) by unconstitutionally diluting the state's burden to establish beyond a reason-

able doubt each element of the offense with which he was charged.

> The Due Process Clause of the Fourteenth Amendment "safeguard[s] against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt." Taylor v. Kentucky, 436 U.S. 487, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause, Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

The language and term combinations found infirm by the United States Supreme Court in Cage and by the South Carolina Supreme Court in State v. Manning, 305 S.C.413, 409 S.E.2d 372 (1991) are either not present in the reasonable doubt charge under review by this Court or are not present in the combinations found misleading. See State v. McLemore, ___ S.C. ___, 425 S.E.2d 752 (1992); State v. Johnson, ____ S.C. ____, 410 S.E.2d 547 (1991). See also, Gaskins v. McKellar, 111 S.Ct. 2277 (1991),

(In denying certiorari, Justice Stevens noted no constitutional infirmity in the reasonable doubt charge which made no reference to the term "doubt as would give rise to a grave uncertainty" which was present in the Cage instruction.) See Cage v. Louisiana, supra. As in Gaskins v. McKellar, supra, this instruction did not contain the language "grave uncertainty" coupled with "moral certainty." Gaskins affirmed the "substantial doubt" and "doubt for which you can give reason" language used in the jury charge under review here. Also, the Court's contrast of reasonable doubt with the term, "not whimsical doubt or fanciful doubt" has been upheld in State v. Johnson, supra; and State v. McElmore, supra, as has the language "substantial doubt," State v. Johnson, supra; and "a real doubt for which you can give reason." State v. McElmore, supra. The reasonable doubt charge given in this case was not such as to lead a reason-

able juror to understand the charge as a whole as allowing a finding of guilt based upon a degree of proof below that required by the Due Process Clause.

This Court finds that the allegation should be dismissed for the primary reason that Applicant has failed to show deficient performance because trial counsel made the appropriate request to charge regarding reasonable doubt and because the charge given was correct in 1986. Trial counsel is not required to anticipate changes in the law or future adoption of new rules. This Court also finds that Applicant has failed to show prejudice because an objection would not have been granted and because the charge given during the 1986 trial is not constitutionally infirm under a current review. Applicant's assertion is without merit and should be denied and dismissed.

D. Burden of proof.

In instructing the jury regarding the State's burden of proof, the trial court charged as follows:

> The State, the prosecution in a case, has the burden of proving the material elements of the charge made against the Defendant. That is the most proper assignment of the burden of proof. We have a situation in any criminal case in which the State, through its various law enforcement agencies and offices and the Solicitor, whose job it is to prosecute any alleged violations of the law in this circuit. Together they make a charge against the Defendant.
>
> So, when we come to the trial of that charge, it is quite proper for the law to say to the person or parties <u>making the charge</u>, "Prove it. Don't just charge the Defendant with a crime. Prove it to the jury which we will impanel to listen to your evidence."
>
> So, that is the basis of the burden of proof. <u>Those asserting the affirmative of some particular issue would have the burden of proving it. Here the State charges the Defendant with murder. Quite properly, the State says, "Prove it and prove it beyond a reasonable doubt."</u>

(Emphasis added). (Tr. p. 543 lines 2-21). Thereafter, the trial court charged the jury as to reasonable doubt and the fact that the

State must establish the material elements of a charge made against the Applicant. (Tr. p. 543 lines 22 - p. 544 line 8). The trial court also charged the jury as to Applicant's presumption of innocence which presumption remains with the Applicant throughout the trial. The trial court further charged the jury that the burden of proving alibi does not shift to the Applicant and reminded the jury repeatedly that the prosecution has the burden of proving every material element of the crime charged. (Tr. p. 542 lines 14-17; p. 547 lines 9-18; p. 551 lines 7-10).

Appellant asserts that the following portion of that charge was erroneous:

> Those asserting the affirmative of some particular issue would have the burden of proving it. Here the State charges the Defendant with murder. Quite properly the State says, "Prove it and prove it beyond a reasonable doubt."

(Emphasis added). (Tr. p. 543 lines 17-21).

Applicant asserts that this portion of the charge was an incorrect statement of the law because he interprets it as an instruction to the jury that he had the burden of proving that he was not guilty. He asserts that trial counsel provided ineffective assistance when counsel failed to object to this portion of the charge.

This Court finds that Applicant's assertion is completely without merit. A reading of the portion of the charge about which Applicant complains in context with those portions preceding and following clearly reflect the trial court was charging to the jury that it is the State which bears the burden of proving Applicant's guilt. The trial court was charging that it is the State which requires that the prosecution -- which is the party making the charge -- to prove Applicant's guilt beyond a reasonable doubt. A jury charge must be taken in context as a whole rather than isolating one

or two sentences. Francis v. Franklin, supra; Cupp v. Naughten, 414 U.S. 141 (1973). Applicant has failed to show a reasonable likelihood that the jury applied this instruction so as to require Applicant to prove his innocence. Estelle v. McGuire, 112 S.Ct. 475 (1991). Counsel's failure to object was entirely appropriate and did not constitute ineffective assistance. Applicant's allegation is without merit and should be denied and dismissed.

E. Malice instructions.

Applicant complains that the solicitor, in his summation to the jury, argued that malice "can be inferred through the use of a deadly weapon." (Tr. p. 532 lines 11-12). He also complains about the following court instruction to the jury on malice:

> You, Mr. Foreman, members of the jury, may infer malice from the wilful, deliberate and the intentional doing of an unlawful act without just cause or legal excuse. You may infer malice from the use of a deadly weapon in the inflection of the fatal wounds.

> I tell you that a deadly weapon is defined as any object which is readily usable for the inflection of serious bodily injury on another person.

(Tr. p. 545 line 19 - p. 546 line 2).

Applicant complains that the trial court in this charge instructed the jury that it may infer malice from the wilful, deliberate and intentional doing of an unlawful act without just cause or legal excuse. He asserts that trial counsel "should have objected to this kind of jury instruction because the jury could have mistakenly--inferred from the confusing instructions that the intent--required to prove murder was that Applicant hit the victim with an urn." (See Attachment (c) of the PCR Application). Applicant alleges the record fails to reflect that he intended to kill anyone. He contends that the record is unclear as to his intent to kill the victim. He complains that the court "cannot infer beyond a reasonable doubt that the presump-

tions did not contribute to the jury's finding of Applicant's intent to kill the victim."

During Applicant's trial, the trial court charged the jury as follows:

> In this case the defendant is charged with the crime of murder. Murder is the unlawful killing of another human being with malice aforethought, either express or implied.
>
> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought; and that proof must be, as I told you earlier, beyond a reasonable doubt.
>
> Malice is defined in the law of homicide -- homicide means killing a human being -- malice is defined in the law of homicide as a term of art, that is, it's a technical term, which imports wickedness and excludes any just cause or excuse. It is something which springs from wickedness, malice. It springs from depravity, from a deprived spirit, from a heart devoid of social duty and fatally bent on mischief. One, not then, having due regard for the social obligations, and the obligations which rest on all mankind as we live here together.

The words express or implied, which I have used in the definition of murder, do not mean two different kinds of malice. They mean to express to you two different methods by which malice might be proven.

Malice may be express as where previous threats of vengeance have been made or where someone lies in wait for someone else to come by so that an assault might be made on that person or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, though no express intention to kill was proved by the direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are themselves proven.

You, Mr. Foreman, members of the jury, may infer malice from the willful, deliberate and the intentional doing of an unlawful act without just cause or legal excuse. You may infer malice from the use of a deadly weapon in the infliction of the fatal wounds.

I tell you that a deadly weapon is defined as any object which is easily and readily usable for the infliction of serious bodily injury on another person.

In its general signification, malice means the doing of a wrong-

ful act intentionally without justification or excuse.

I tell you, Mr. Foreman, members of the jury panel, that if the factual situation has been proved from which you infer the existence of malice from certain factual situations which I have described for you, you may use such inferences, along with all the other evidence which has been presented, in making your determination as to whether malice existed in the mind and heart of the defendant at the time of the striking of the fatal blow.

You recall that I told you in the definition of murder that there must be malice aforethought. The law does not require that malice exist for any particular length of time before the commission of an act, but it must be aforethought, that is, it must exist for at least some time prior to the commission of the act. There must be a combination of a previous evil intent and the act which produces the fatal result.

I tell you that the State is not required to prove a motive for a killing.

(Emphasis added). (Tr. p. 544 line 9 - p. 546 line 25).

At the conclusion of the trial court's charge, trial counsel requested that the

Court give the Elmore charge with regard to malice. Trial counsel argued that the trial court failed to charge the jury that where facts produced by the State are sufficient to raise an inference of malice, the inference is simply an evidentiary fact to be considered, and that the jury may give it such weight as they determine appropriate. (Tr. p. 553 line 22 - p. 554 line 13). The trial court declined to further charge the jury on malice, stating that the charge given was sufficient. (Tr. p. 554 lines 14-24; p. 55 lines 1-4). Included in his brief to the South Carolina Supreme Court on appeal, trial counsel specifically raised and argued the trial court's failure to give the charge as specifically worded in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Respondent's Exhibit 3 (trial counsel's Supreme Court argument notes) indicates this issue was presented during oral argument on appeal. The parties have

stipulated that trial counsel had researched the law regarding malice. This Court finds that trial counsel's action was reasonable with regard to the implied malice charge Applicant now raises. While Applicant contends a presumption was created, this Court finds that the record is devoid of presumption in the charge which shifted the prosecutorial burden of proof. See Francis v. Franklin, 471 U.S. 307 (1985). The charge contains none of the words which have been recognized as unacceptable burden shifting presumptions such as "presumption," "rebuttal," "reasonable explanation," or "unless to the contrary be proved." See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). The charge does not require Applicant's rebuttal or explanation of evidence presented against him and makes it clear that it is for the jury to decide from all the evidence whether malice is proven. See State v. Gathers, 295 S.C. 476, 369

S.E.2d 140 (1988). See also Smith v. State, Op. No. 23738 (S.C. Sup. Ct. filed Nov. 16, 1992). The allegation is without merit and should be denied and dismissed.

F. Juror.

Lastly, Applicant asserts that juror, Emory Clark, was improperly permitted to serve on his jury. He asserts that during voir dire Mr. Clark stated that he was employed in the civil division of the United States Attorney's Office. Applicant complains that trial counsel should have challenged the seating of Mr. Clark as a juror because a "natural bond" may exist between state and federal prosecuting entities. He also contends that Mr. Clark should have been disqualified from serving on the jury pursuant to S.C. Code Ann. §14-7-820. It is Applicant's assertion that Mr. Clark was employed within the walls of a courthouse.

The record reflects that when Applicant's case was called for trial, the mem-

bers of the jury panel had been qualified to serve as jurors earlier that week by Judge Kinon. (Tr. p. 3 lines 20-23). Thereafter, Judge Harris conducted voir dire of the jury panel for Applicant's trial to determine any bias or interest the particular jury members. (Tr. p. 4 line 9 - p. 11 line 11). During voir dire, juror Clark, advised the trial court that he was an Assistant United States Attorney but that he was employed in the civil division rather than the criminal division. (Tr. p. 7 lines 14-15). Thereafter, the jury was impaneled and Mr. Clark served on Applicant's jury. (Tr. p. 11 line 18). It has been stipulated that Mr. Clark, as Assistant United States Attorney in 1986, worked in offices located on one entire floor of the Federal Building which was also the same building in which the United States Bankruptcy Court leased office space. Applicant complains because the juror's office was located in the same building as

the Bankruptcy Court that he was employed within the walls of a courthouse.

An accused in a criminal prosecution is entitled to a competent and impartial jury, and it is the duty of the trial judge to see that a jury of competent, fair, and impartial jurors is impaneled. State v. Cooper, 353 S.E.2d 441 (1986). In January 1986, S. C. Code Ann. §14-7-820 provided:

> No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any court house shall be eligible as a juryman in any civil or criminal case.

While the South Carolina Supreme Court has ruled that once a trial judge determines a potential juror is employed in any capacity within a courthouse, he must disqualify the person from jury service, State v. Reed, 362 S.E.2d 13 (1987), the Court has also adopted a functional approach in interpreting and applying the provisions of this statute. State v. Cooper, supra. The South

Carolina Supreme Court has determined that a special deputy sheriff whose duty was to serve process was not disqualified from serving as a juror pursuant to this statute. Bryant v. State, 213 S.E.2d 451 (1975). The Court has also determined that a highway patrolman was an officer of the State who had broad authority and was equivalent to a deputy sheriff and should have be disqualified. State v. Cooper, supra. However, the Court has also determined that a criminal investigator with the United States Navy was not disqualified under S.C. Code Ann. §14-7-820 as he held none of the offices or positions listed within that statute. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986). The Court also recognized that magistrates were disqualified from serving pursuant to the statute because the magistrate may have to pass upon bills against the person whom he had bound over for trial. State v. Graham, 60 S.E. 431 (1908). The

South Carolina Supreme Court has also determined that there is no abuse of discretion in seating a juror who had once worked for SLED, State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983), but that one who had previously passed upon the facts of the case cannot be competent to sit as a juror on a subsequent trial of the same case. City Council v. Fowler, 25 S.C. 901, 25 S.E. 900 (1896). In any event, it is necessary for the complaining party to make a showing of prejudice by the fact that the juror served on the jury. Bryant v. State, supra; State v. Graham, supra; State v. Rector, 155 S.E. 385 (1930).

This Court initially finds that S.C. Code Ann. §14-7-820 should be interpreted to mean that any person employed within the walls of any county courthouse should be ineligible to serve on a jury. The entire statute read in context limits its application to specific county officers. S.C. Code Ann. §14-7-850 further strengthens this

argument in that it exempts, rather than disqualifies, officers of the United States from serving on a jury. See State v. Matthews, supra. Mr. Clark was employed by the federal government and was not a county officer. This is important in that it is the county officers or employees in county courthouses who may have contact or opportunity for contact with or knowledge about the trial matters of this nature -- not unrelated entities such as a federal bankruptcy court.

This Court also finds that Mr. Clark was not barred by the statutory provision disqualifying a person employed within the walls of any courthouse. The statute could not have contemplated employment in a limited purpose facility which specializes in non-jury matters. It is clearly inferable that the evil sought to be guarded against was service by employees who are located

within the walls of courthouses hearing the same or similar matters.

This Court further finds that Mr. Clark's place of employment was not a courthouse. In 1986, the United States Attorney's office was located in the Federal Building in Columbia, South Carolina. The Federal Building is a federally owned and managed property in which tenants lease office space. This Court finds that the United States Bankruptcy Court was one of those tenants but was confined to two floors of the building. The fact that the Bankruptcy Court leased and occupied two floors of a federally owned building does not make the entire building a United States Courthouse. In fact, the United States Courthouse was and is still located across the street from the Federal Building. Moreover, the Bankruptcy Court was contained within two floors of the building and the United States Attorney's Office occupied a totally

separate and segregated location. Further, the United States Attorney's Office and the Department of Justice are within the executive branch of the federal government and not the judicial branch. Clearly, the United States Attorney's office was not operating within the walls of a courthouse as contemplated by the statute.

As to a "natural bond" between the prosecution and Mr. Clark based upon Mr. Clark's position within the civil division of the United States Attorneys' Office, this Court finds that there is no automatic disqualification in such instances. See State v. Matthews, supra; State v. Hess, supra. Had the legislature intended to disqualify from service on any jury any employee of a prosecutorial or law enforcement agency, it could clearly have done so. Nevertheless, the record indicates that Mr. Clark served as a lawyer in the civil division and was not a prosecutor. Further,

during voir dire, Mr. Clark was questioned and indicated he could fairly and impartially serve on Applicant's jury. There has been no showing by Applicant of a "natural bond" or of any prejudice to him by the service of Emory Clark on his jury.

Most importantly the record reflects and it has been stipulated that trial counsel had thoroughly investigated potential jury members, was aware of Mr. Clark's employment, and very much desired to have Mr. Clark seated on Applicant's jury. (See Tr. p. 269 lines 15-18; Respondent's Exhibits #1 [Juror Strike Sheet], #6 [Jury List]). Notes made by trial counsel on the jury list indicate each juror was individually considered and that it was counsel's trial strategy to, if possible, seat Mr. Clark on the jury as a most desirable juror. It was counsel's opinion that Mr. Clark possessed the experience and knowledge to better understand the issues involved in

Applicant's confession and alibi defenses. Counsel's trial strategy was reasonable and Applicant has failed to show that counsel's action in this regard was deficient or prejudicial. The allegation should be denied and dismissed.

This Court funds that in no manner did Applicant's trial attorneys represent him ineffectively. This Court funds that the performance by trial counsel was exemplary and that the Application for Post-Conviction Relief must be denied and dismissed in its entirety.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed; and

2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6th day of June, 1993.

s/COSTA M. PLEICONES
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

James Donald Fossick,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appeal from Richland County
Costa M. Pleicones, Judge

Opinion No. 24188
Submitted November 16, 1994
Filed January 30, 1995

AFFIRMED IN PART AND REVERSED IN PART

M. Anne Pearce, Assistant Appellate Defender, of South Carolina Office of Appellate Defense, for petitioner.

T. Travis Medlock, Attorney General; Donald J. Zelenka, Chief Deputy Attorney General; and Salley W. Elliott, Deputy Attorney Genera; all of Columbia, for respondent.

PER CURIAM: Petitioner claims the

Post Conviction Relief judge erred in failing to grant Post Conviction Relief because trial counsel did not object to the trial judge's charge on reasonable doubt. We disagree. Affirmed pursuant to Supreme court Rule 220(b) and the following authority: State v. Johnson, 306 S.C. 119, 410 S.e.2d 547 (1991) cert. denied, ___ U.S. ___, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992) (a reasonable doubt instruction which merely uses the term "substantial doubt," without any reference to moral certainty" or "grace uncertainty," is not reversible error).

Next, Petitioner claims the Post Conviction Relief judge erred in failing to grant Post Conviction Relief when trial counsel did not object to solicitor's closing argument that the Petitioner showed no remorse. We agree and reverse the circuit court order denying Petitioner's Post Conviction Relief pursuant to Supreme Court Rule 220(b) and the following authorities:

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) ("No right is more fundamental than the right of an accused to plead not guilty...Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent."); Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984) (counsel ineffective for failing to object to improper closing statements by solicitor); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992) (petitioner prejudiced "to the extent that there exists a probability that counsel's deficient performance affected the outcome of petitioner's trial.")

s/A. Lee Chandler C.J.
s/Ernest A. Finney A.J
s/Jean H. Toal A.J.
s/James E. Moore A.J.
s/John H. Waller, Jr. A.J.

"Petition for Rehearing
is denied.

s/Ernest A. Finney, Jr. C.J.
s/Jean H. Toal A.J.
s/James E. Moore A.J.
s/A. Lee Chandler A.J.

February 23, 1995."

APPENDIX C